Neutral Citation Number: [2024] EWHC 877 (Comm).
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

CL-2023-000668

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

15th April 2024

Before

HHJ PELLING KC

BETWEEN:

REPUBLIC OF KOSOVO
Claimant

-v-

CONTOURGLOBAL KOSOVO LLC
Defendant

Yash Bheeroo and **Ravi Jackson**
(Instructed by **Squire Patton Boggs LLP**) appeared on behalf of the Claimant

Charles Kimmins KC And **Mark Tushingham**
(Instructed by **Three Crowns LLP)** appeared on behalf of the Defendant

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JUDGMENT

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JUDGE PELLING:

Introduction

1. This is the hearing of an appeal by the Government of Kosovo ("GOK") under section 68 of the Arbitration Act 1996, by which GOK challenges a final award issued by the majority of an Arbitral Tribunal convened under the ICC Rules of Arbitration by which they held that GOK was liable to pay the defendant ("CKL") the sum of €20,053,125.63. GOK contends that the majority failed in its duty imposed by section 30(1)(a) of the Arbitration Act 1996 to act fairly and impartially between the parties by failing to give GOK an opportunity to further address the quantum issues that arose following a post-hearing procedural order that referred to the quantum issues. It is said that the failure constituted a serious irregularity under section 68(2)(a) of the 1996 Act.

Applicable Legal Principles

2. By section 33 of the Arbitration Act 1996:

> "1. The Tribunal shall (a) act fairly and impartially as between the parties giving each party reasonable opportunity of putting its case and dealing with that of his opponent and (b) adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of matters falling to be determined.
>
> 2. The Tribunal should comply with that general duty in conducting the arbitral proceedings in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

By section 68 of the Arbitration Act:

> "1. A party to arbitral proceedings may, upon notice to the other parties and to the Tribunal, apply to the court challenging the award in the proceedings on the ground of serious irregularity affecting the Tribunal, the proceedings or the award ...
>
> 2. Serious irregularity means an irregularity of one or more of the following kinds which a court considers as cause or will cause substantial injustice to the applicant (a) failure by the Tribunal to comply with section 33, general duty of the Tribunal ...

> 3. If there is shown to be serious irregularity affecting the Tribunal, the proceedings or the award the court may (a) remit the award to the Tribunal in whole or in part for reconsideration, (b) set the award aside in whole or in part or (c) declare the award to be of no effect in whole or in part. The court shall not exercise its power to set aside or declare an award to be of no effect in whole or in part unless it is satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration."

3. The principles applicable to challenges under section 68 of the Arbitration Act 1996 were summarised comprehensively by Popplewell J as he then was in Terna Bahrain Holding Company WLL v Al Shamsi & ors [2012] EWHC 3283 (Comm) [2013] 1 Lloyd's Rep 86 at paragraph 85 in these terms:

> "(1) In order to make out a case for the court's intervention under section 68.2A the applicant must show:
>
> > (a) a breach of section 33 of the Act, ie the Tribunal has failed to act fairly and impartially between the parties giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;
> >
> > (b) Amounting to a serious irregularity;
> >
> > (c) Giving rise to substantial injustice.
>
> (2) The test of the serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.
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> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention. Relief under section 68 will only be appropriate where the Tribunal has gone so wrong in its conduct of the arbitration and where its conduct is so far removed from what could reasonably be expected from the arbitral process that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of section 33 where a Tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the Tribunal thinks the parties have missed the real point which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

> (5) There is, however, an important distinction between on the one hand the party having no opportunity to address a point or his opponent's case, and on the other hand a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.
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> (6) The requirement of substantial injustice is additional to that of serious irregularity and the applicant must establish both.
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> (7) In determining whether there has been a substantial injustice the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point the Tribunal might well have reached a different view and produced a significantly different outcome."

As Carr J as she then was emphasised in Obrascon Huarte Lain SA v Qatar Foundation for Education, Science & Community Development [2019] EWHC 2539 (Comm); [2019] 2 Lloyd's Rep 559 at paragraph 44:

> "Section 68 imposed as high threshold for a successful challenge ... it is not to be used simply because one of the parties is dissatisfied with the result, but rather as a long stop in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice 'calls out for it to be corrected'."

The *rationale* for the approach identified in points (2), (3) and (5) of Popplewell J's summary is that identified by Carr J in paragraph 44 of her judgment in that case in these terms:

> "As a matter of general approach the courts strive to uphold arbitration awards; they do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault."

It is for that reason that in relation to an issue said to engage point 4 of Popplewell J's summary:

> "Ultimately the question which arises under section 33A is whether there has been a reasonable opportunity to present or meet a case is one of fairness and will always be one of fact and degree that is sensitive to the specific circumstances of each individual case."

- see Reliance Industries Limited and another v Union of India [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562 at paragraph 32.

The Facts.

4. This dispute arises from a series of contracts by which CKL was to design, construct then operate and maintain a power plant for GOK. Under one of the relevant agreements, various conditions precedent had to be performed by or on behalf of GOK by a defined date and in default CKL was entitled to terminate the various agreements. Where that occurred, GOK came under an obligation to pay CKL its development costs, as defined in the agreements, up to a cap of €19.7 million. The agreements were terminated for non-compliance with the conditions precedent to which I have referred and CKL claimed to have incurred actual development costs as defined of €31.5 million, and therefore claimed the maximum of €19.7 million. GOK declined to pay the sums claimed, maintaining that it was not liable to CKL in the events that had happened and in any event CKL had failed to demonstrate it had incurred the alleged or any development costs and the dispute was referred to arbitration, as I have explained.

5. In the arbitration, GOK disputed the claim, both on liability and quantum-related grounds. In relation to quantum, GOK maintained that CKL had failed to prove any of the costs it claimed. In order to prove its claim, CKL relied on a series of quarterly summaries dated between August 2018 and April 2020 and the minutes of the meeting in which it was contended GOK had accepted that CKL had incurred development costs of €18.5 million by August 2018. By its defence GOK challenged the adequacy of this evidence and, on 17 December 2021, GOK submitted a request for various categories of documents said to be relevant to the quantum issues being

> "documents identifying, summarising and substantiating the expenditures that ContourGlobal alleges it incurred and for which it seeks recovery in this arbitration, including:
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> (a) invoices for services and goods provided to ContourGlobal;
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> (b) proofs of payment by ContourGlobal;
>
> (c) Monthly bank statements indicating ContourGlobal's cash flows and;

> (d) summary or ledger of related party transactions in whatever format it was kept or presented by ContourGlobal in the ordinary course of business ... "

In response, CKL produced a series of 1,577 invoices but no other documents. The Tribunal declined to order the production of any of the other documents that had been applied for, having previously directed that no documents produced would form part of the evidentiary record for the arbitration unless submitted specifically by one or other of the parties as exhibits. Thereafter, CKL filed its Reply but did not refer to any of the invoices it had disclosed. It took the position that the material it relied on was sufficient to prove its case. GOK had, from the outset, argued that the evidence relied on by CKL was insufficient to enable CKL to make good its quantum claim. It maintained that position in its Rejoinder. It maintained there were major differences between the quarterly summaries on which CKL relied and the invoices it had produced; that some of the invoices were duplicates and none of them contained proof of payment and/or were not in respect of development costs on their face and as defined in the agreement.

6. After the pleading process was complete, CKL applied and was permitted to rely on the invoices it had disclosed. The final hearing of the arbitration took place on 10 to 11 October 2022. No witnesses were called by either party. There were oral submissions made during the course of that hearing and post-hearing written submissions were filed thereafter, on 11 November 2022. In its post-hearing closing submissions GOK's position remained, as it had always been, that CKL had not approved any of the development costs for which it claimed payment.

7. In the course of the oral submissions, CKL had mentioned in passing to the Tribunal that the Tribunal had the power under the ICC Rules to appoint an expert accountant in order to examine the invoices and report to the Tribunal, if the Tribunal considered that appropriate. That remark was made in the context of a comment from the dissenting arbitrator in the course of the hearing that it appeared to be CKL's case that if the Tribunal considered it necessary to examine each invoice in order to decide whether it was for or included reasonable development costs as defined then it would be for the Tribunal to undertake that task (which the arbitrator had described as "*legwork*") - a comment with which CKL's counsel expressly agreed. In that context, the reference to the power to

appoint a Tribunal-appointed expert is readily understandable, as is the desire of a Tribunal to preserve that as a possibility, pending final determination of the reference.

8. In the final award, the Tribunal determined the quantum issue at paragraphs 272 to 281. The Tribunal acknowledged the onus of proof rested on CKL and that it relied on the quarterly submissions, and that it had submitted the invoices which had been accepted into the record. See paragraph 272. The Tribunal noted, at paragraph 273, that the project agreements did not require GOK to approve the summaries, noted that although GOK maintained the sums referred to in the quarterly summaries were to be subjected to a final reconciliation and concluded, at paragraph 274, that the relevant agreements did not contain any provision to that effect.

9. In relation to GOK's submission that neither the quarterly reports or the invoices proved any part of the sums claimed, the majority concluded at paragraphs 278 to 281 as follows:

> "278. The expenses involved were of various types including payments to consultants and also expenses and portions of various employees' salaries of various CG Group entities allocated to the project according to CG intercompany agreements. These categorisations of the payments were consistent with the invoices that CG produced. After inspection of the 1,517 invoices, the GOK parties relied on generalised arguments and challenged with particularity only a handful of them in minor amounts as unreasonable. See Day 1, transcript 83 to 84, and 204 to 208."
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> 279. It is unusual for a claimant such as CG to fail to offer some testimonial explanation for how the claimed expenses were allocated and accounted for. Nevertheless, there are indicia of regularity sufficient to accept them. The development costs data were tracked regularly in CG's own contemporaneous internal reports to management because CG evaluated its budgets with an eye to the level of those costs. See C-126. The reports also were in line with the development costs budget discussed with and submitted to GOK on 21 March 2019 ... and were audited by independent auditors and included in the published accounts of CG's parent ... summaries of them were made available to the GOK parties regularly and were noted by GOK personnel on the basis of their entities' potential exposure to CG claims that later were asserted in the arbitration ..."
>
> 280: Schedule 1 to the PPA requires that supporting documentation be provided for development costs claims no later than 20 days after the conclusion of each quarter. The GOK parties did not request additional documentation beyond what was submitted with the quarterly reports until this arbitration and the production of the invoices provided that

> information. The GOK parties had access to all the underlying invoices for a substantial period of time and failed to present any analysis of the alleged defects in all but a few of them."
>
> 281 The majority of the Tribunal concludes based on the indicia of regularity discussed above that CG has established that it incurred development costs of not less than €19.7 million and that GOK is required to pay CG that amount. The implementation agreement makes this an obligation of GOK, not any other GOK party ..."

On the facts as I have so far summarised them, there could be no conceivable ground for concluding that the majority have proceeded otherwise than in a procedurally fair way, applying the principles summarised earlier. GOK submits, however, that a different conclusion follows as a result of two procedural orders made by the Tribunal some weeks after the submission of the post-hearing briefs, but before publication of the final award.

10 On 2 January 2023, the Tribunal issued its procedural order number 5. At paragraph 1 of the order the Tribunal stated:

> "This case presents somewhat unusual evidentiary issues which the Tribunal has been engaged in deliberations since receiving the parties' post-hearing briefs on 11 November 2022 ... concludes leaves the record at this stage incomplete in important respects. Claimants submitted no witness statements in support of its case. The respondents took a similar approach, submitting only the witness statement of Mr Ismaili ... and no written witness evidence thereafter. No witness testified at the hearing as claimant did not call Mr Ismaili for cross-examination, and the respondents did not apply for him to be called to the hearing by the Tribunal. The parties presented the Tribunal with a limited paper record, which may have gaps, and counsel's arguments about what were represented as facts important to the major dispute at issue by the project was not ready to go forward on the required transfer date."

The issue to which the Tribunal referred in the final sentence of paragraph 1 of the procedural order I am now considering was one which was relevant to liability alone. At paragraph 3 of the procedural order the Tribunal stated:

> "The Tribunal has decided to summon the parties to provide additional evidence pursuant to Article 25(4) of the ICC Rules in the form of documents to be produced to each other and the Tribunal on or before 31 January 2023."

The order then set out at paragraphs 4 to 7 requirements for the production of additional categories of documents which the Tribunal sought from the parties for the purposes of assisting it in relation to the liability issues that arose. The Tribunal then added at paragraphs 8 to 9 of procedural order number 5:

> "8. At the hearing on 11 October 2022 claimant suggested the Tribunal might appoint an independent expert to report to it on damages pursuant to Article 25(3) of the ICC Rules ...
>
> 9. The Tribunal has not decided issues of liability and may not reach damages issues. Should it do so, however, the Tribunal considers that analysis and organisation of the existing record regarding claimant development costs and the costs of GOK studies is not sufficiently complete and it may decide to appoint an expert to investigate and report on those matters pursuant to Article 25(3). If so, the Tribunal will consult with the parties regarding the terms of reference for such an expert and the identification of an appropriate expert."

11 On 5 January 2023, GOK emailed the Tribunal maintaining in essence that, if the Tribunal considered CKL had failed to produce the necessary evidence relevant to liability, the Tribunal should issue an award dismissing the claim.

12 On 8 February 2023, the Tribunal issued procedural order number 6. Paragraphs 1 to 3 were concerned with the consequence that followed from the production of the additional documents sought by the Tribunal that, as I have said, were relevant to the issue of liability alone. The only paragraph that referred to the quantum issue was paragraph 4, which was in these terms:

> "The Tribunal has not decided issues of liability and may not reach damages issues. Should it do so, however, as noted in procedural order number 5, the Tribunal may decide to appoint an expert to investigate and report on those matters pursuant to Article 25(3). If so, the Tribunal will consult the parties regarding the terms of reference for such an expert and the identification of an appropriate expert."

13 Following further submissions from the parties that take matters no further, on 29 March 2023 the Tribunal declared the arbitration closed and, on 28 August 2023, the majority published their final award in which it found for CKL on both the liability and quantum case, dealing with quantum in the terms I set out a moment ago.

The Serious Irregularity Issue.

14 GOK submits that the language of procedural order number 5 created a reasonable expectation that the Tribunal considered the evidence relied upon by CKL on its quantum case was not complete and "... *would not proceed to determine the quantum issue without further evidence or submissions* ..." That, it maintains, was further emphasised by paragraph 5 of procedural order number 6. I reject that submission for the following reasons.

15 I do not accept that paragraph 9 of procedural order number 5, whether read by itself or in combination with paragraph 5 of procedural order number 6, amounted to or was intended to be, or could reasonably be read, as any form of determination concerning CKL's quantum case. That much is apparent from the opening sentence of paragraph 9 of procedural order number 5, which makes clear that the Tribunal had not decided liability, much less the quantum issue that would be relevant only if liability was decided in favour of CKL. The first sentence of paragraph 4 of procedural order number 6 was in precisely similar terms. That being so, I do not accept that on any fair or reasonable reading of either paragraph of either procedural order, taken separately or even when read together, the Tribunal had reached any even provisional conclusions concerning quantum.

16 The second sentence of paragraph 9 does not have any different effect. It must be read in its correct context, which I set out earlier. When it refers to the analysis and organisation of the existing record relating to development costs not being sufficiently complete, the Tribunal was picking up and developing the point made by the dissenting member of the Tribunal in the course of the closing arguments - that CKL had left it to the Tribunal to attempt to analyse the effect of the invoices for itself, which led in turn to the suggestion that the Tribunal might consider appointing an expert accountant to carry out that analysis. All that the Tribunal were doing was to recall that point and to indicate that it had not determined but might yet decide to appoint such an expert and to indicate the procedure it would adopt if that course was followed. Nothing said in the procedural orders merits or could reasonably justify the conclusion that the Tribunal had decided that it would not proceed on the quantum issue without further evidence or

submissions. It had received the evidence that had been offered and the submissions that had been made in relation to it.

17 I do not accept GOK's submission that there were only three alternatives available to the Tribunal following the issue of procedural order number 5, being those identified in paragraph 57 of its written submissions in support of this challenge – that is (a) to dismiss the claim for damages, (b) appoint an expert or (c) summon the parties to provide further evidence or submissions - because that would be to ignore CKL's submissions that it had sufficiently proved its case on quantum which it had not yet considered, as is apparent from the first sentence of paragraph 9 Procedural order 5 and paragraph 4 of procedural order 6 respectively.

18 There is nothing in paragraph 9 of PO5, particularly when read with paragraph 4 of PO6, that supports the conclusion either that the Tribunal was ruling that CKL's quantum case had failed or that it was ruling out deciding the quantum issues on the evidence or submissions available to it following completion of the arbitral process on the evidence and submissions available to it; or that it would not accept submissions made by CKL if and when it became necessary to consider the quantum issues. All that the tribunal was doing was reserving the position as to whether to appoint an expert and alerting the parties as to how the Tribunal would proceed if it decided to adopt that course.

19 GOK criticises the Tribunal on the basis that in order to act fairly the Tribunal ought to have informed GOK that it was departing from what it had said in paragraph 9 at PO5, why it was so departing and giving GOK the opportunity to make submissions concerning the proposed departure. I do not agree. Once it is accepted that the Tribunal was merely reserving the position to appoint an expert, if thought necessary, if and when it came to consider the quantum issues that arose, there was no requirement to do anything unless and until it decided to appoint an expert, which in the end it did not do. Having taken that decision, the Tribunal could have proceeded in the manner suggested by the dissenting member of the Tribunal in the course of the oral closing submissions or as was submitted by CKL. In the end, the majority decided to proceed in the manner submitted for by CKL at the hearing of the arbitration. There is nothing in paragraph 9 of PO number 5 which indicates what the Tribunal would do if it decided not to appoint an expert and it did not say anything that precluded the majority from doing as it did.

20 This was an enormously experienced international Arbitral Tribunal. It would be next to impossible that such a Tribunal could have intended to conclude that a quantum claim it expressly stated it had not decided was nevertheless to be treated as having failed. No reasonable Tribunal would have proceeded in this fashion and certainly would not do so by a single paragraph in a procedural order. Had it intended to conclude that the quantum issue failed, it would have said so in an award to that effect and may well have considered that it was not necessary to resolve the liability issues which would, by virtue of such a decision, become academic. It did none of these things. It did not do so because it was not and no reasonable person could conclude that it was ruling that the quantum claim had failed or could succeed only if additional evidence was produced. The relevant context to which I have referred shows that that was not what the Tribunal meant.

21 To construe the procedural orders in the way GOK contends they should be construed is, with respect, to fail to read the procedural orders relied on in the reasonable and commercial way the case law I have summarised earlier in this judgment requires but, on the contrary, it necessarily involves an attempt to find technical inconsistencies and faults precisely as that case law warns against. Once that is understood, it is close to unarguable that the majority had failed to act fairly. The quantum issue was gone into comprehensively, both in the pre and post hearing written procedure of the arbitration and at the hearing itself. For those reasons, I reject the submission that GOK has shown that the Tribunal was so wrong, or that its conduct was so far removed from what could reasonably be expected, that justice calls for a correction to be made; the test I am required to apply by the case law I summarised earlier.

22 That GOK's case on the issue I am now considering is an after-the-event construct is apparent from its supplemental post-hearing submission, dated 5 March 2023. It invites the Tribunal to conclude that CKL had not proved its quantum claim, not on the basis that the Tribunal had already concluded that it would be dismissed or sure to fail if ever it was necessary to consider it.

Substantial Injustice

23 It is not necessary for me to consider this at any length given the conclusions I have so far reached. In order to satisfy this requirement, however, it is necessary for GOK to

show that, had the Tribunal acted as it contends it should have, the outcome might well have been different. The difficulty about that is that GOK has not made any attempt to demonstrate what additional evidence it would have adduced or what additional submissions it would have advanced that might have had that effect that it had not or could not have advanced at any earlier stage in the arbitral process. Each of the points identified in paragraph 64 of GOK's written submissions were matters that either the Tribunal was aware of or which had been or could reasonably have been the subject of evidence and/or submissions already considered by the Tribunal. It is therefore entirely unreal to suppose that, if the Tribunal had summonsed the parties and no further evidence was produced, that the Tribunal might well have dismissed the claim. No attempt has been made, whether by draft expert report or otherwise, to advance any new point or analysis, much less to explain why it was not addressed at any earlier stage.

24 GOK's only answer to this point is to submit that had the tribunal recalled the parties in order to enable them to make further submissions it would have submitted that the Tribunal was not entitled to change its position from that which it maintains had been adopted by procedural order number 5. That assumes as correct the proposition that the Tribunal in paragraph 9 of procedural order number 5 had decided the quantum claims had failed. As I have explained, that is not what a reasonable person, reading that paragraph in its relevant context, would have concluded the Tribunal was saying. Indeed, had that been what was intended, it could reasonably have been thought that the dissenting member would have made precisely that point in his dissent but, in the event, he did not.

25 For these reasons, it follows that this section 68 challenge fails and must be dismissed.

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